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2 **NOT FOR PUBLICATION**

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8 UNITED STATES BANKRUPTCY COURT

9 SOUTHERN DISTRICT OF CALIFORNIA

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12 In re

Case No. 04-05050-JM7

13 RAMO PRACTICE MANAGEMENT, INC.

14 a California corporation,

15 Debtor.

16

17 In re

Case No. 04-05051-JM7

18 RM&M PRACTICE MANAGEMENT, INC.,

19 a California corporation,

20 Debtor.

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MEMORANDUM DECISION

22 Miller & Holguin, counsel for the Debtors ("the Movant"), seeks

23 authorization to surcharge the proceeds of the secured creditors'

24 collateral with a portion of the fees and costs they billed in these

25 cases. The Movant relies on 11 U.S.C. § 506(c), and seeks a surcharge

26 of \$33,862.27 in the Ramo Practice case, and a surcharge of \$41,377.49

27 in the RM&M Practice case. After a hearing on May 4, 2005, and review

28 of the supplemental briefs submitted by the parties, the Court will

1 sustain the objections and deny the request for the surcharge.

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3 **FACTS**

4 The Movant filed a Chapter 11 petition for each Debtor on June
5 4, 2004, along with a petition for a third Debtor, R&N Practice
6 Management, Case No. 04-05047-JM11. Within a week of filing the
7 petitions, the Movant filed an Ex Parte motion to jointly administer
8 the three cases because "each of the Debtors plays an inter-dependent
9 role in their common enterprise, and no single debtor could operate
10 successfully without the participation of the other two debtors." The
11 Debtors had not yet filed their schedules or statements of affairs,
12 so the Ex Parte motion for joint administration was granted based on
13 the representations made in the motion and supporting declaration.

14 The following week, the Movant filed a complaint for injunctive
15 and declaratory relief against Dr. Manji, a dentist practicing at
16 several locations managed by these two Debtors. The Debtors alleged
17 that Dr. Manji froze the bank accounts and the Debtors were no longer
18 able to manage the practices in accordance with the Management
19 Services Agreement ("MSA") entered between the Debtors and various
20 dental corporations. Dr. Manji's response disputed the Debtors'
21 interpretation of the MSA, and claimed the Debtors were trying to sell
22 assets which belonged to the dental corporations. At a hearing on
23 June 30, 2004, the parties agreed to the appointment of a Chapter 11
24 Trustee in these two cases, but not in the R&N Practice case. A
25 Chapter 11 Trustee was appointed the next day.

26 On July 14, 2004, the Court, sua sponte, entered an Order that
27 the cases be separately administered and that by July 23, 2004, each
28 Debtor file a complete set of schedules and statement of affairs

1 listing the information applicable to the respective case. The
2 Debtors filed corrected schedules on July 29, 2004. The assets in the
3 Ramo Practice case were listed as "unknown". In the RM&M case the
4 assets were cryptically identified in a balance sheet dated December
5 31, 2003, and attached as an exhibit to the schedules. After months
6 of controversy, the Trustee eventually sold or otherwise transferred
7 the estate assets surrounding the dental practices, and these two
8 cases were converted to Chapter 7 on March 24, 2005. The R&N Practice
9 case was dismissed on June 1, 2005, based on a settlement with the
10 landlord and representations that there were no further assets or
11 debts to be resolved in the bankruptcy proceeding.

12 To support the surcharge request, the Movant submitted itemized
13 billing statements in each case, and contends that certain services
14 benefitted the secured creditors by enabling the continued operation
15 of the practices which were eventually sold for over \$1 million. The
16 Movant states the Debtors' books and records were very disorganized,
17 so the attorneys had to spend many hours helping the Debtors organize
18 their affairs. The Movant seeks a surcharge for services in the
19 following categories:

- 20 - prepare and file voluntary petition;
- 21 - review files and work with the Trustee's attorneys to analyze
22 lien searches;
- 23 - revise the Debtors' schedules and statements of affairs at
24 request of the Trustee;
- 25 - prepare and file an emergency motion against Dr. Manji;
- 26 - involvement in negotiations for the use of cash collateral;
- 27 - review and comment on motions and proposed sale agreements;
- 28 - conferences with the Trustee, the secured creditors and parties

1 in interest;

2 - help the Trustee fend off relief from stay motions from
3 landlords;

4 - spend time with the principals of the Debtors, at the request
5 of the Trustee, to determine which dental practice owned certain
6 equipment and was obligated on specific leases.

7 The secured creditors and guarantors filed objections, and Gary
8 Rudolph, former counsel for the Chapter 7 Trustee, also filed a
9 declaration in opposition to the Movant's request. The parties
10 objected on the grounds that the Movant lacks standing to request a
11 surcharge, that the services rendered did not benefit the collateral
12 and that the services were not reasonable and necessary. Mr.
13 Rudolph's declaration stated that the Movant had not performed a UCC-1
14 search before submitting the schedules, and the schedules and
15 statements of affairs filed by the Movant were completely unreliable.
16 This created additional work for the Trustee who was faced with the
17 task of further investigating the true state of the Debtors' affairs
18 or rely on inaccurate documents. Mr. Rudolph also mentioned that
19 Movant should not be compensated for travel time from Los Angeles, and
20 that the Movant prepared the MSA between the Debtors and Dr. Manji.
21 He stated that the complaint against Dr. Manji was caused by the
22 confusion concerning interpretation and drafting of the MSA.

23 24 **DISCUSSION**

25 The payment of administrative expenses is normally borne by
26 unencumbered assets of the estate rather than the secured creditors'
27 collateral. Section 506(c) provides a narrow exception, and the
28 Trustee (or Debtor-in-Possession) must prove that the expenses to be

1 surcharged were incurred primarily for the benefit of the secured
2 creditor or that the secured creditor caused or consented to the
3 expenses. In re Cascade Hydraulics, 815 F.2d 546, 548 (9th Cir 1987).
4 The party seeking a surcharge must prove that the expenses were:
5 1)reasonable; 2) necessary; and 3) beneficial to the secured creditor.
6 The Movant has the burden to show a "concrete and quantifiable
7 benefit", and the surcharge is limited to the amount of the benefit
8 actually proven. In re Debbie Reynolds Hotel & Casino, Inc., 255 F.3d
9 1061, 1068 (9th Cir. 2001).

10 The Movant has not met the applicable burden to impose a § 506(c)
11 surcharge against the secured creditors. To receive payment from the
12 proceeds of the collateral of secured creditors requires a showing
13 that the services were primarily of benefit to the secured creditor,
14 not just the customary services provided on behalf of the debtor. The
15 Movant bears the burden to prove that the expenses were incurred to
16 preserve or dispose of the secured creditor's collateral and necessary
17 under the circumstances. Decker v. Advantage Fund Ltd., 362 F.3d 593,
18 596 (9th Cir. 2004).

19 The Movant has failed to meet such a burden. The services
20 identified by the Movant fall within the normal scope of services
21 provided by an attorney for a debtor. It is the responsibility of
22 debtor's counsel to prepare accurate schedules, guide the debtor
23 through § 341(a) meetings, obtain approval for use of cash collateral
24 and submit budgets. It is also their responsibility to review motions
25 after a trustee is appointed to protect the interest of the client,
26 and to assist the debtor in cooperating with the trustee. 11 U.S.C.
27 § 521.

28 Furthermore, only the Trustee or Debtor-in-Possession has

1 standing to assert a § 506(c) claim. Hartford Underwriters Ins. Co.
2 v. Union Planters Bank, 530 US 1 (2000). The Trustee was appointed
3 on July 1, 2004, so the Debtors were no longer Debtors-in-Possession
4 after that date. The Movant urges this Court to grant standing, sua
5 sponte, to pursue the surcharge as a derivative right in accordance
6 with a practice concerning avoidance actions that was mentioned in a
7 footnote to Hartford Underwriters at 530 U.S. 13, n.5. Alternatively,
8 the Movant asks for leave to re-file the surcharge motion and seek
9 standing. The Movant contends that the Trustee impliedly consented
10 to the surcharge motion by failing to file an objection and that it
11 would be inequitable to deny standing simply because Movant did not
12 seek permission before filing the motion.

13 The Court does not view the lack of objection by the Trustee as
14 implied consent to the Movant's standing to pursue the surcharge.
15 Without a motion and opportunity for hearing, the Court would not
16 grant the Movant derivative authority to proceed with the request on
17 behalf of the Trustee. More importantly, the Movant has not provided
18 any authority decided after Hartford Underwriters for the Court to
19 grant such a request. Even if the Movant could supply a legal basis
20 to authorize standing, the facts of this case do not support the
21 Movant. The Trustee did not hire the Movant and the services which
22 Movant claims were performed at the Trustee's request seem to fall
23 within the scope of the duties of a Debtor in any event; such as
24 identifying the Debtors' assets and liabilities, and filing accurate
25 schedules with the Court.

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1 **CONCLUSION**

2 The Movant lacks standing to pursue a surcharge claim under §
3 506(c). Even if the Movant had standing, or the Court were inclined
4 to authorize Movant to pursue a surcharge, Movant has not proved that
5 the services rendered were reasonable, necessary and of benefit to the
6 collateral. The objections are sustained and the request for
7 surcharge is denied. Counsel for Finance Unlimited is instructed to
8 submit a proposed order within 14 days of the date this Memorandum
9 Decision is entered.

10 Dated:

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12 JAMES W. MEYERS, Judge
13 United States Bankruptcy Court
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